YEAP BOON HAI

v.

PP

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
ABDULL HAMID EMBONG JCA
VINCENT NG JCA
[CRIMINAL APPEAL NO: B-05-53-2001]
3 APRIL 2009

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Whether evidence adduced justified conviction for murder or culpable homicide - Penal Code, ss. 299, 300, 302*

CRIMINAL PROCEDURE: *Trial - Failure to cross-examine prosecution witness on crucial issue - Effect - Whether amounted to acceptance of testimony - Credibility of witness - Proper approach to take*

EVIDENCE: *Circumstantial evidence - Murder - Proof - Whether upon the entire evidence - Standard of Proof - Whether sufficient for prosecution to prove beyond reasonable doubt - Whether must further prove that circumstances consistent with accused having committed the crime and inconsistent with any other reasonable explanation - Penal Code, ss. 299, 300, 302*

EVIDENCE: *Witness - Failure to call witness - Whether indicating fabrication or afterthought - Credibility - Whether any specific rule to be followed in determining credibility - Penal Code ss. 299, 300, 302*

The accused was found guilty of six counts of murder for the murder of six members of his family by setting fire to their shophouse, and was sentenced to death under s. 302 of the Penal Code. He filed this appeal against the trial judge's decision on the grounds that the circumstantial evidence on which the prosecution had relied was insufficient to convict him; and in the alternative, that the evidence adduced for the prosecution did not come within the definition of murder in s. 300 of the Penal Code but instead came within culpable homicide contained in s. 299. The accused contended that the trial judge had failed to consider:

A (i) the failure of the chemist (SP6) to ascertain the age of the petrol in a plastic container, one of the exhibits; the cause of the fire which killed the victims; or the origin of broken glass found at or near the crime scene;

B (ii) the failure to lift fingerprints from the plastic containers which SP9 testified was filled with petrol;

(iii) the contradictions in evidence of the Fire Services Department's Operations Officer (SP15) under cross-examination and re-examination.

C

Held (dismissing the appeal)
Per Low Hop Bing JCA:

(1) In a case depending on circumstantial evidence, it is enough
D if the court merely says that it is satisfied of the accused's guilt beyond reasonable doubt, without further saying that the facts proved irresistibly point to one and only one conclusion, namely the accused's guilt. *Jayaraman & Ors v. PP* (foll).

E **(2)** The evidence of SP15, that the fire was caused by petrol, an inflammable substance, which had seeped through the staircase to the bottom and facilitated the spread of the fire, has negated or rebutted the defence's submission relating to SP6's failure to ascertain the cause of fire, the age of the
F petrol, or the origin of the broken glass.

(3) Where there is evidence indicating the identities of the alleged offenders and the sale transaction, the lifting of fingerprints assumed little value or significance. In this case, SP9's direct and uncontroverted evidence had, without a doubt, established
G the identity of the accused. Hence, the lifting of the accused's fingerprints from the four plastic containers would assume little value or significance. *PP v. Mansor bin Mohd Rashid & Anor* (foll)

H **(4)** No hard and fast rule can be laid down for determining the credibility or otherwise of a witness. In this instance, the appellate court was unable to identify any contradiction in SP15's evidence. The trial judge had had the audio visual advantage and was entitled to accept the evidence of SP15
I as credible.

(5) The trial judge had made a finding of facts based on actual evidence, which was corroborated in material particulars by inferences reasonably and properly drawn from other evidence adduced before him. The finding was not against the weight of evidence. The appellate court, should be slow to interfere with the finding of facts by the trial court as it does not have the advantage of seeing and hearing the witnesses and therefore of assessing their credibililty. *PP v. Wan Razali Kassim* (refd); *Krishnan & Anor v. PP* (refd); *Law Tim Wah v. PP* (refd).

(6) At the trial, the defence had sought to attribute criminal responsibility to the accused's Indonesian employee, Yu. The accused's failure to tell the investigating officer (SP25) of Yu's existence, and raising it for the first time in the defence case, was an illustration of fabrication and an afterthought. *Chu Tak Fai v. PP* (refd). Also, the accused's failure to raise the issue relating to the existence of Yu by way of cross-examination of prosecution witnesses amounted to an acceptance of the witnesses' testimony. *Wong Swee Chin v. PP* (foll). The trial judge had specifically found that Yu had never existed at all; and had rejected the defence, thereby holding that the prosecution had proved its case beyond all reasonable doubt to warrant the convictions and sentences. The judge's careful analysis of the defence case reflected a correct approach and was beyond reproach.

(7) The defence case was an outright denial and nothing more; it was of no assistance to the accused: *PP v. Ku Lip See* (refd).

(8) The circumstantial and corroborative evidence was overwhelming and the finding of facts should be endorsed on appeal. *Dennis Lani Ak Mat v. PP* (refd).

(9) Whether an offence is culpable homicide or murder depends upon the degree of risk to human life. If death is a likely result, it is culpable homicide; if it is the most probable result, it is murder. In the last analysis, it is a question of degree of probability. All cases falling within s. 300 must necessarily fall within s. 299, but all cases falling within s. 299 do not necessarily fall within s. 300. The setting of fire by the accused to the shophouse by means of petrol clearly brought about an enormous degree of risk to the lives of the

A occupants therein. The death caused thereby was not just a likely result, but was certainly the most probable result. It was therefore murder. *Tham Kai Yau & Ors v. PP* (foll).

[Order accordingly.]

B ***Bahasa Malaysia*** *Translation Of Headnotes*

Tertuduh didapati bersalah atas enam pertuduhan bunuh kerana membunuh enam ahli keluarganya dengan membakar rumah kedai mereka dan telah jatuhkan hukuman mati di bawah s. 302 Kanun C Keseksaan. Beliau memfailkan rayuan ini terhadap keputusan hakim bicara atas alasan bahawa keterangan ikut keadaan di atas mana pendakwaan mengasaskan kesnya adalah tidak mencukupi untuk mensabitkan beliau, dan secara alternatifnya bahawa keterangan seperti yang dikemukakan oleh pendakwaan tidak terangkum ke D dalam pentakrifan bunuh di bawah s. 302 Kanun Keseksaan tetapi sebaliknya hanya dirangkumi oleh homisid salah di bawah s. 299 Kanun yang sama. Tertuduh mendakwa bahawa hakim bicara telah gagal menimbangkan: (i) kegagalan Ahli Kimia (SP6) menentukan kelamaan petrol dalam bekas plastik yang merupakan salah satu E dari eksibit; sebab musabab kebakaran yang membunuh mangsa-mangsa; atau asal usul pecahan gelas yang dijumpai di atau dekat tempat kejadian; (ii) kegagalan untuk mengambil cap jari dari bekas plastic yang SP9 katakan mengandungi petrol; dan (iii) Percanggahan keterangan yang diberikan oleh Pegawai Operasi F Jabatan Bomba (SP15) semasa pemeriksaan balas dan pemeriksaan semula.

Diputuskan (menolak rayuan)
Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:

G

(1) Dalam suatu kes yang bergantung kepada keterangan ikut keadaan, ianya memadai jika mahkamah hanya menyatakan bahawa ia berpuas hati mengenai kebersalahan tertuduh di luar keraguan munasabah, tanpa perlu menyatakan selanjutnya H bahawa fakta-fakta yang dibuktikan menunjukkan secara tidak dapat tidak kepada hanya satu sahaja konklusi, iaitu kebersalahan tertuduh. *Jayaraman & Ors v. PP* (diikuti)

(2) Keterangan SP15 bahawa kebakaran disebabkan oleh petrol, I suatu bahan senang terbakar, yang mengalir dari tangga ke bawah dan sekaligus menyemarakkan lagi api, telah menyangkal hujah pembelaan berkaitan kegagalan SP6 untuk menentukan sebab musabab kebakaran, kelamaan petrol atau asal usul pecahan gelas.

(3) Di mana terdapat keterangan yang menunjukkan identiti pesalah yang didakwa dan transaksi jualbeli, pengangkatan cap jari adalah tidak berapa penting atau bernilai sangat. Dalam kes ini, keterangan terus SP9 yang tidak disangkal, tanpa apa-apa keraguan, telah membuktikan identiti tertuduh. Oleh itu, mengangkat cap jari tertuduh dari empat bekas plastik adalah tidak bernilai atau penting sangat. *PP v. Mansor Mohd Rashid & Anor* (diikuti).

(4) Tidak ada kaedah khusus atau tertentu yang boleh dibentangkan bagi menentukan kredibiliti seseorang saksi atau sebaliknya. Dalam kes ini, Mahkamah Rayuan tidak dapat mengenalpasti sebarang percanggahan dalam keterangan SP15. Hakim bicara mempunyai manfaat pandang dengar dan berhak untuk menerima keterangan SP15 sebagai boleh dipercayai.

(5) Hakim bicara telah membuat dapatan fakta berdasarkan keterangan sebenar yang disokong dengan secara penting oleh inferens-inferens yang dipetik dengan munasabahnya dari keterangan lain yang dikemukakan di hadapan beliau. Dapatannya itu tidak bertentangan dengan keberatan keterangan. Mahkamah Rayuan seharusnya berhati-hati untuk campur tangan dalam dapatan fakta mahkamah bicara kerana tidak mempunyai manfaat melihat dan mendengar saksi-saksi, dan seterusnya menilai kebolehpercayaan mereka. *PP v. Wan Razali Kassim* (dirujuk); *Krishnan & Anor v. PP* (dirujuk); *Law Tim Wah v. PP* (dirujuk).

(6) Di perbicaraan, pembelaan cuba mengaitkan liabiliti jenayah kepada pekerja Indonesia tertuduh, Yu. Bagaimanapun, kegagalan tertuduh untuk memberitahu pegawai penyiasat (SP25) mengenai kewujudan Yu, dan tindakannya membangkitkan buat pertama kali perkara tersebut di peringkat kes pembelaan, jelas menunjukkan bahawa ianya adalah suatu pemalsuan dan percaturan semula. *Chu Tak Fai v. PP* (dirujuk). Selain itu, kegagalan tertuduh membangkitkan perkara Yu melalui pemeriksaan balas saksi-saksi pendakwaan adalah sama seperti menerima testimoni saksi-saksi tersebut. *Wong Swee Chin v. PP* (diikuti). Hakim bicara secara spesifik mendapati bahawa Yu tidak pernah wujud, dan telah menolak pembelaan, sekaligus memutuskan bahawa pendakwaan telah membuktikan kesnya di luar keraguan munasabah yang mewajarkan sabitan dan hukuman. Penganalisaan kes secara cermat oleh hakim mencerminkan pendekatan yang betul dan tidak boleh dicurigai.

(7) Pembeaan hanyalah satu penyangkalan kosong semata-mata. Maka ia tidak boleh membantu tertuduh. *PP v. Ku Lip See* (dirujuk)

(8) Keterangan ikut keadaan dan koroboratif adalah terlalu kuat dan dapatan fakta wajar disahkan di peringkat rayuan. *Dennis Lani Ak Mat v. PP* (dirujuk)

(9) Sama ada kesalahan adalah kesalahan menyebabkan kematian atau pun bunuh adalah bergantung kepada tahap risiko kepada nyawa manusia. Jika kematian merupakan akibat yang mungkin berlaku, maka ia adalah kesalahan homisid salah; sebaliknya, jika kebarangkalian berlakunya adalah amat besar, maka ia adalah bunuh. Pada analisis terakhir, ianya bergantung kepada tahap kebarangkalian. Semua kes yang terangkum di bawah s. 300 semestinya merangkumi s. 299, tetapi semua kes-kes yang dirangkumi s. 299 tidak semestinya merangkumi s. 300. Perbuatan tertuduh membakar rumah kedai dengan menggunakan petrol jelas mewujudkan ancaman besar kepada nyawa penghuni-penghuninya. Kematian yang diakibatkan itu bukan hanya sesuatu yang mungkin berlaku, tetapi jelas merupakan kesan yang besar kemungkinan berlaku. Maka ia adalah bunuh. *Tham Kai Yau & Ors v. PP* (diikuti)

Case(s) referred to:

Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Chan Chwen Kong v. PP [1962] 28 MLJ 307 ***(refd)***
Chang Kim Siong v. PP [1968] 1 MLJ 36 ***(refd)***
Chu Tak Fai v. PP [1998] 4 CLJ 789 CA ***(refd)***
Chung Kum Moey v. PP [1967] 1 MLJ 205 ***(refd)***
Dennis Lani Ak Mat v. PP [2001] 4 CLJ 707 CA ***(refd)***
Eng Sin v. PP [1974] 2 MLJ 168 ***(refd)***
Hyam v. Director of Prosecutions [1975] AC 55 HL ***(refd)***
Idris v. PP [1960] MLJ 296 ***(refd)***
Jayaraman & Ors v. PP [1982] 2 MLJ 306 ***(foll)***
Kamis v. PP [1975] 1 MLJ 46 ***(refd)***
Karam Singh v. PP [1967] 2 MLJ 25 ***(refd)***
Kartar Singh & Anor v. Rex [1952] MLJ 85 ***(refd)***
Krishnan & Anor v. PP [1981] 2 MLJ 121 FC ***(refd)***
Law Tim Wah v. PP [1978] 1 MLJ 167 ***(refd)***
Lim Foo Yong v. PP [1976] 2 MLJ 259 ***(refd)***
M'Naghten Rules [1843] 10 CL & F200 HL
McGreevy v. DPP [1973] 1 WLR 276 ***(refd)***
Mohamed Kasdi v. PP [1969] 1 MLJ 135 ***(refd)***
Muniandy v. PP [1973] 1 MLJ 179 ***(refd)***
PP v. David Ackowuah Bonsu [1999] 2 CLJ 677 HC ***(refd)***

PP v. Ku Lip See [1981] 1 MLJ 258 ***(refd)***
PP v. Lee Eng Kooi [1993] 2 CLJ 534 HC ***(refd)***
PP v. Lin Lian Chen [1992] 4 CLJ 2086 ***(refd)***
PP v. Wan Razali Kassim [1970] 2 MLJ 79 ***(refd)***
PP v. Mansor Mohd Rashid & Anor [1997] 1 CLJ 233 FC ***(foll)***
State of Assam v. Muhim Berkataki and Anor AIR [1987] SC 98 ***(refd)***
Sunny Ang v. PP [1966] 2 MLJ 195 FC ***(refd)***
Tham Kai Yau & Ors v. PP [1977] 1 MLJ 174 ***(foll)***
Wong Swee Chin v. PP [1981] 1 MLJ 212 ***(foll)***

Legislation referred to:
Penal Code, ss. 34, 299, 300, 302

Penal Code [Ind], ss. 34, 302

For the appellant - Mohd Firuz Jaffril (Mahadi Abd Jumaat with him); M/s Firuz Jaffril, Aidil & Zarina
For the respondent - Abdul Razak Musa DPP

[Appeal from the High Court, Shah Alam, Selangor Criminal Trial No: 45-6-1998]

Reported by Lynette Tan

JUDGMENT

Low Hop Bing JCA:

Appeal

[1] The appellant ("the accused") was charged with six counts of murder, by causing the death of six persons on 14 April 1997, at about 3.50am in a shophouse at No. 450A, Jalan 18/2A, Taman Seri Serdang ("the shophouse"), Hulu Langat, Selangor Darul Ehsan, punishable under s. 302 of the Penal Code. (Unless otherwise stated, a reference hereinafter to a section is a reference to that section in the Penal Code).

[2] After a full trial, the Shah Alam High Court found the accused guilty, convicted and sentenced him to death on all the six charges.

[3] On 10 December 2008, we dismissed the accused's appeal, and affirmed the convictions and sentences. We now give our grounds.

A **Finding Of Facts**

[4] The narrative of facts as found by the trial court unfolds a gruesome scenario which mirrors an unmitigated disregard for the lives of fellow human beings, more specifically, the immediate
B relatives of the accused. Six precious lives were ruthlessly wiped out. The victims are:

(1) Koh Seik Lang, the accused's mother-in-law (in the first charge);

C (2) Khor Chai Peng, the accused's maternal uncle (in the second charge);

(3) Kee Sok Kiang, the accused's wife (in the third charge);

D (4) Khor Khim Im, the accused's nephew-in-law (in the fourth charge);

(5) Kee Kim Hup, the accused's brother-in-law (in the fifth charge); and

E (6) Yeap Cheok Wai, the accused's son (in the sixth charge).

[5] On 14 April 1997, at about 3.50am, the shophouse was gutted by fire and six victims, who were in blazes, were burnt to death. While it is true that there was no eye-witness to bear
F testimony to the person who had set fire to the shophouse, there were other credible and reliable evidence for the trial court to consider.

[6] SP7, a nurse attached to the Kajang Hospital, was staying in her house opposite the shophouse. At about 3am on 14 April
G 1997, she switched on the light of her toilet, which was facing the shophouse, in order to answer the call of nature. She saw the accused some three to four metres away. The accused was seen fleeing and descending hurriedly from the staircase of the shophouse which was already on fire then. SP7 knew the accused
H as one of the occupants. He always quarrelled with his wife, the late Kee Sok Kiang (the victim in the third charge). The accused's nickname is "orang gila" ("mad man"). Be it noted that this is merely a nickname and has nothing to do with the well-known *M'Naghten Rules* [1843] 10 CL & F200 HL.

I

[7] Petrol station attendant (SP9), a male Malay, was on duty there from 10.30pm on 13 April 1997 to 7.30am the next day. At 2.30am on 14 April 1997, a male Chinese brought four empty

plastic containers to purchase petrol from SP9. After SP9 had set the petrol computer, the male Chinese filled the containers, each with RM5 of petrol. He gave a RM50 note to SP9 who in return gave him the change of RM30. The male Chinese requested SP9 to send him to his car, which was parked at the Phase 1 Serdang housing estate nearby. SP9 used his motorcycle to send the male Chinese *via* the backlane of the shophouse. It was about five minutes by motorcycle from the petrol station. The male Chinese, as pillion rider, placed two of the four containers in the basket of SP9's motorcycle, and carried the other two in his hands. SP9 observed the male Chinese for about 30 minutes. He identified the male Chinese, who has a fair complexion, is thin in stature, about 170cm tall, bespectacled and speaks Bahasa Malaysia with a Chinese accent. SP9 had positively identified the male Chinese in an identification parade conducted by Inspector Ravinathan a/l Selvarajah (SP21) on 24 April 1997 at 3pm at the Kajang Police Station. SP9 also identified the male Chinese as the accused in court.

[8] SP12 runs a photocopying business at No. 449, Jalan Susur 18/2A, Taman Seri Serdang, next to the shophouse which also has the same business. He corroborated SP7's evidence that the accused and his wife (the victim in the third charge) had frequently quarrelled. On 14 April 1997, at about 3.30am, he heard a big bang coming from a fast moving car with broken glasses.

[9] SP13 and SP14 are the accused's brother- in-law and sister-in-law respectively. They were staying in the shophouse. They confirmed that on 13 April 1997, in the evening, the accused had a series of quarrels, not only with his wife, but also his mother-in-law (the victim in the first charge), and another brother-in-law, Kee Kim Hup (the victim in the fifth charge).

[10] The quarrel between the accused and his wife arose from the wife's request for divorce. The accused was furious when his wife chased him out of the shophouse, which she claimed was hers. The accused had also claimed ownership of the shophouse, and threatened to make his brother-in-law, Kee Kim Hup, a bankrupt. The accused refused to leave the shophouse as he wanted to see his children there. The quarrel was witnessed by SP13 and SP14. It was also witnessed by the accused's mother, two elder sisters and younger brother, all of whom left the shophouse subsequently at 12 midnight. The accused stayed back to watch video at the back portion of the shophouse.

[11] Mr Lim Kieng Chwee, the Government Chemist (SP6) received several exhibits, including a white plastic container with a cover, from detective L/Cpl Wong Chee Meng (SP18). The Chemist found 280ml of black liquid with pinkish tint. Upon analysis, he confirmed that the liquid was petrol which, being exposed, had extensively evaporated. The liquid contained carbon particles.

[12] SP15, the Operations Officer of the Fire Services Department, who headed the operations to put off the fire, testified that the fire was caused by inflammable substances such as petrol which had seeped through the staircase to the bottom, and facilitated the spread of the fire.

[13] The officer in charge of the Serdang Police Station (SP20) sent the victims' bodies to the Kajang Hospital for post-mortem.

[14] The medical assistant (SP5) received the victims' bodies while the accused's brother-in-law (SP13) identified them for post-mortem.

[15] The pathologist (SP8) who conducted the post-mortem testified that all the six victims had been positively identified. His finding was that their respective organs showed signs of soot, thereby confirming that smoke inhalation was the cause of death.

[16] In the defence case, the accused had largely confirmed the evidence adduced for the prosecution including his quarrels with his wife, mother-in-law and brother-in-law, all of whom were victims in the fire. However, according to the accused, he went to the shophouse with his Indonesian employee by the name of Yu, to whom he had given RM50 to buy food, as Yu was hungry. The accused told Yu not to return to the shophouse as the accused had quarrelled with his wife. The accused then suddenly remembered that his car has run out of petrol. Subsequently, together with Yu, he went to the petrol station. The accused asked Yu to fill the car with petrol, and to use the petrol to destroy the photocopying machines in the shophouse. Yu then drove the accused in the accused's car to the shophouse. Yu told the accused that he (Yu) had poured some of the petrol to set fire to the photocopying machines in the shophouse. At the 14th milestone, Jalan Puchong Kuala Lumpur, the accused asked Yu to get out of the car. He then drove himself to the 7-Eleven Convenience Store in Subang Jaya and bought 100 tablets of Panadol, two cans of beer and a can of Guiness Stout. The

accused then returned to his own house in Shah Alam where he washed down 30 tablets of Panadol with the beer. He was rendered unconscious. He regained consciousness the next day when his sister and elder brother came to inform him of the fire to the shophouse in which his son (the victim in the sixth charge) was burnt to death. When his sister showed him the newspapers which carried the fire episode, he said he wanted to surrender himself to the police. Apart from asking Yu to destroy the photocopying machines, the accused denied having asked Yu to set fire to the shophouse.

[17] The accused did not return to the shophouse to ask what had happened to his wife and children there. He also did not make a police report on Yu's act of setting fire to the photocopying machines in the shophouse. The accused did not even inform the investigating officer of Yu's existence at all.

Circumstantial Evidence

[18] In submitting that the circumstantial evidence on which the prosecution had relied on is insufficient to convict the accused, learned counsel Mr Mohd Firuz Jaffril (assisted by Mr Mahadi Abd Jumaat) complained that the learned trial judge had failed to consider:

(1) The failure of the Chemist (SP6) to ascertain the age of the petrol, the cause of the fire, or the origin of the broken glasses;

(2) The failure to lift fingerprints from the plastic containers which SP9 testified was filled with petrol, as the fingerprints were of great significance, on the authority of *PP v. Mansor Mohd Rashid & Anor* [1997] 1 CLJ 233 FC; and

(3) The contradictions in SP15's evidence under cross-examination and re-examination, citing *Mohamed Kasdi v. PP* [1969] 1 MLJ 135 HC; and *PP v. Lee Eng Kooi* [1993] 2 CLJ 534 HC.

[19] Learned deputy public prosecutor, Mr Abdul Razak Musa supported the learned trial judge's finding of facts, more specifically the roles played by the accused. He added that by circumstantial evidence, the prosecution has proved beyond reasonable doubt that the accused was the person who had intentionally caused the death of the six victims. The authorities which the prosecution relied on are:

(1) *PP v. Wan Razali Kassim* [1970] 2 MLJ 79 FC;

(2) *Krishnan & Anor v. PP* [1981] 2 MLJ 121 FC;

(3) *Law Tim Wah v. PP* [1978] 1 MLJ 167 FC;

(4) *Chan Chwen Kong v. PP* [1962] 28 MLJ 307 CA;

(5) *PP v. David Ackowuah Bonsu* [1999] 2 CLJ 677 HC;

(6) *Dennis Lani Ak Mat v. PP* [2001] 4 CLJ 707 CA; and

(7) *Sunny Ang v. PP* [1966] 2 MLJ 195 FC.

[20] Under this head, the question that calls for determination is:

> On the entire evidence, including the circumstantial evidence adduced at the trial, has the prosecution established all six charges against the accused beyond reasonable doubt?.

[21] We note that the principles governing circumstantial evidence have been authoritatively considered in *Jayaraman & Ors v. PP* [1982] 2 MLJ 306, where the Federal Court was requested to answer the following question:

> Whether it is correct law that in dealing with a case which relies on circumstantial evidence it does not make any difference if a court finds that in considering all the evidence it is satisfied beyond reasonable doubt that the accused is guilty of the offence or if the court says that the evidence points only to the irresistible conclusion that the accused is guilty.

[22] In delivering the judgment for the Federal Court, Suffian LP (as he then was) referred to *McGreevy v. DPP* [1973] 1 WLR 276; [1973] 1 All ER 503 HL and admirably analysed several local cases *viz*:

(1) *Kartar Singh & Anor v. Rex* [1952] MLJ 85 CCA Singapore;

(2) *Idris v. PP* [1960] MLJ 296 CA;

(3) *Chan Chwen Kong, supra;*

(4) *Sunny Ang, supra;*

(5) *Karam Singh v. PP* [1967] 2 MLJ 25 FC;

(6) *Chang Kim Siong v. PP* [1968] 1 MLJ 36 FC;

(7) *Muniandy v. PP* [1973] 1 MLJ 179 FC;

(8) *Eng Sin v. PP* [1974] 2 MLJ 168 FC;

(9) *Kamis v. PP* [1975] 1 MLJ 46 FC; and

(10) *Lim Foo Yong v. PP* [1976] 2 MLJ 259 HC.
(collectively "the local cases").

[23] The learned Lord President:

(1) applied *McGreevy, supra*, where the House of Lords held that in a jury trial, it is the duty of the judge to make clear to the jury in terms which are adequate to cover the particular features of the case that they must not convict unless they are satisfied beyond reasonable doubt of the guilt of the accused; and there is no rule that, where the prosecution case is based on circumstantial evidence, the judge must, as a matter of law, give a further direction that the facts proved are not only consistent with the guilt of the accused, but also such as to be inconsistent with any other reasonable conclusion;

(2) modified the ruling (in the local cases) which seems to lay a heavier burden of proof on the prosecution where it depends on circumstantial evidence than where it depends on direct evidence;

(3) explained that the irresistible conclusion test only seems to place on the prosecution a higher burden of proof than in a case where it depends on direct evidence, for *in fact to apply the irresistible conclusion test is another way of saying that the prosecution must prove the guilt of the accused beyond reasonable doubt;* and

(4) held that *in a case tried without a jury and depending on circumstantial evidence, it is enough for the trial judge to remember only that the prosecution need prove its case beyond reasonable doubt,* and failure by him to also say that the circumstances are not only consistent with the accused having committed the crime but also such that they are inconsistent with any other reasonable explanation, is not fatal. In other words, *in a case depending on circumstantial evidence, it is enough if the court merely says that it is satisfied of the accused's guilt beyond reasonable doubt,* without further saying that the facts proved irresistibly point to one and only one conclusion, namely the accused's guilt.

[24] To answer the above question, we would refer generally to the learned trial judge's finding of facts and specifically to the following:

A (1) The accused's quarrel with his late wife who had wanted to divorce him prior to the fire;

(2) The accused's quarrel with his mother-in-law (the victim in the first charge), and his brother-in-law (Kee Kim Hup (the
B victim in the fifth charge) in connection with the ownership of the shopouse and the photocopying business therein;

(3) The accused's threat to make Kee Kim Hup a bankrupt;

(4) Before the fire, the accused had purchased RM20 worth of
C petrol which was packed in four plastic containers;

(5) The accused was seen fleeing and descending hurriedly from the staircase of the shophouse when the fire started to spread;

(6) The accused was nowhere to be seen at the time of putting
D off the fire at the scene or at any time subsequently;

(7) The accused had been positively identified at the identification parade and in the court as the person who singularly played the above roles which led to the fire; and

E

(8) The non-existence of the Indonesian employee, Yu, to whom the accused had purportedly attributed the setting of the fire to the photocopying machines in the shophouse, by means of the petrol.

F

[25] The evidence of the Operations Officer of the Fire Services Department (SP15), that the fire was caused by petrol, an inflammable substance, which had seeped through the staircase to the bottom and facilitated the spread of the fire, has negated or
G rebutted the defence submission relating to SP6's failure to ascertain the cause of fire, the age of the petrol, or the origin of the broken glasses.

[26] Next, the lifting of fingerprints. In *Mansor bin Mohd Rashid & Anor, supra*, the Federal Court, speaking through Chong Siew
H Fai (CJ (SS)) (as he then was), held that:

(1) Where the identity of a culprit is in question or required to be proved, fingerprint evidence would be of great significance and immense value;

I

(2) However, where there is evidence indicating the identities of the alleged offenders and the sale transaction, the lifting of fingerprints assumed little value or significance.

[27] The evidence in the mainstream of the instant appeal indicated that the petrol station attendant (SP9) had sold RM20 of petrol to the accused who had used four empty plastic containers to carry it. There was exchange of money between SP9 and the accused for the sale and purchase of the petrol. This is further strengthened by SP9's evidence that he had sent the accused to the accused's car by using SP9's motorcycle, and also the placement of the petrol containers in the basket of the SP9's motorcycle and in the accused's hands. To say the least, SP9's direct and uncontroverted evidence has, without a doubt, established the identity of the accused. Hence, the lifting of the accused's fingerprints from the four plastic containers would assume little value or significance.

[28] The challenge by the defence to the credibility of SP15, seemingly on the contradictions in his evidence under cross-examination and re-examination, must now be examined. The learned trial judge had specifically accepted SP15's evidence that the fire was caused by inflammable substances such as petrol which has seeped through the staircase of the shophouse. We are of the view that no hard and fast rule can be laid down for determining the credibility or otherwise of a witness. It is only when a witness gives or makes two statements which differ in material particulars that there is ground for believing that he is not a truthful witness: per Ali J (as he then was) in *Mohamed Kasdi, supra*. Hence, if in a case the prosecution leads two sets of evidence, each one of which contradicts and strikes at the other and shows it to be unreliable, then the court would be left with no reliable and trustworthy evidence upon which the conviction of the accused might be based, as inevitably the accused would have the benefit of such a situation: per Vincent Ng JC (now JCA) in *Lee Eng Kooi, supra.*

[29] In the instant appeal, we are unable to identify any contradiction in SP15's evidence. The learned trial judge has had the audio visual advantage. He is entitled to accept the evidence of SP15 as credible. As a matter of fact, SP15's evidence that the six victims died as the direct result of the fire is consistent with and corroborated by the medical findings of the pathologist (SP8) that the six victims' respective organs showed signs of soot, thereby confirming that smoke inhalation was the cause of death and the fact that the fire was caused by the petrol was corroborated by the evidence of the petrol station attendant (SP9) who had sold the petrol to the accused. There is no plausible

A reason for a public officer such as SP15 to lie in court and risk perjury, particularly in a trial involving capital punishment: see eg. *PP v. David Ackowuah Bonsu* [1999] 2 CLJ 677 HC per Hishamudin Yunus J.

B **[30]** The learned trial judge has made a finding of facts based on actual evidence, which finding of fact is corroborated in material particulars by inferences reasonably and properly drawn from other evidence adduced before him. The finding is not against the weight of evidence. Sitting in the appellate court, we should be C slow to interfere with the finding of facts by the trial court as we do not have the advantage of seeing and hearing the witnesses and therefore of assessing their credibililty: see eg, *Wan Razali Kassim, supra; Krishnan & Anor, supra*; and *Lim Tim Wah, supra.*

D **[31]** Now, we shall consider the defence case. The accused's failure to raise the issue relating to the existence of Yu, by way of cross-examination of prosecution witnesses on this fact of crucial importance, clearly attracts the application of the well-known general rule enunciated by the Federal Court in the E judgment of Raja Azlan Shah CJ (M) (now HRH the Sultan of Perak) in *Wong Swee Chin v. PP* [1981] 1 MLJ 212, that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony.

[32] The accused has indeed sprung a surprise on the F prosecution in so far as Yu's existence is concerned. The accused took the risk for having kept Yu's existence "up his sleeve". This sort of defence has been branded as "recent invention": see *PP v. Lim Lian Chen* [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC per Edgar Joseph Jr. SCJ (as he then was); and *Alcontara* G *Ambross Anthony v. PP* [1996] 1 CLJ 707, also by his Lordship.

[33] Apparently, the defence case is an outright denial and nothing more. It is of no assistance to the accused: *PP v. Ku Lip See* [1981] 1 MLJ 258 HC per Yusof Abdul Rashid J (as he then H was).

[34] The accused's failure to tell the investigating officer (SP25) of Yu's existence, but raising it for the first time in the defence case, is an illustration of fabrication and an afterthought: see eg, *Chu Tak Fai v. PP* [1998] 4 CLJ 789 CA, per Denis Ong JCA. I

[35] The learned trial judge had specifically found that Yu had never existed at all; and so has rejected the defence, thereby holding that the prosecution has proved its case beyond all reasonable doubt to warrant the convictions and sentences. The learned judge's careful analysis of the defence case reflects a correct approach and is beyond reproach. The learned trial judge has not misdirected himself. The evidence of the accused who sought to attribute criminal responsibility to his Indonesian employee, Yu, has been properly rejected.

[36] We are of the view that the circumstantial and corroborative evidence is overwhelming. The finding of facts should be endorsed on appeal: see eg, *Dennis Lani ak Mat, supra*. The answer to the above question under this head is in the affirmative.

Murder Or Culpable Homicide?

[37] The defence advanced an alternative argument that the evidence adduced for the prosecution does not come within the definition of murder in s. 300. Instead, it is culpable homicide contained in s. 299. Support was sought in:

(1) *Tham Kai Yau & Ors v. PP* [1977] 1 MLJ 174 FC; and

(2) *Chung Kum Moey v. PP* [1967] 1 MLJ 205 PC.

[38] The prosecution took the position that the evidence revealed the offence of murder.

[39] The question which requires determination herein is whether the evidence adduced at the trial justifies conviction for murder as defined in s. 300.

[40] The defence contention calls for an examination of the distinctions between culpable homicide and murder under s. 299 and s. 300 respectively, These two sections, where relevant, merit reproduction as follows:

> **299. Culpable homicide**
>
> Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

300. Murder

Except in the cases hereinafter excepted, culpable homicide is murder:

(a) if the act by which the death is caused is done with the intention of causing death;

(b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

(c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

(d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

[41] The Privy Council considered these two sections of the Singapore Penal Code (equipollent to our ss. 299 and 300) in *Chung Kum Moey, supra.* Viscount Dilhorne explained, *inter alia*, as follows:

(1) The four limbs of s. 300 were not mutually exclusive; and

(2) The contrast between the use of the words "likely to cause death" in s. 299 and the words" sufficient in the ordinary course of nature to cause death" in the third limb of s. 300 indicated that a high degree of certainty was required to justify a conviction under that limb for murder.

[42] In *Tham Kai Yau, supra*, Raja Azlan Shah FJ (now HRH the Sultan of Perak) delivered the judgment for the Federal Court and discussed in detail the distinctions between the two offences. The essential principles may be extracted as follows:

(1) Whether the offence is culpable homicide or murder depends upon the degree of risk to human life. If death is a likely result, it is culpable homicide; if it is the most probable result, it is murder;

(2) In the last analysis, it is a question of degree of probability; and

(3) All cases falling within s. 300 must necessarily fall within s. 299, but all cases falling within s. 299 do not necessarily fall within s. 300.

[43] Applying the above distinctions between ss. 299 and 300 to the finding of facts in the court below, we are of the view that the setting of fire by the accused to the shophouse by means of petrol clearly brought about an enormous degree of risk to the lives of the occupants therein. The death caused thereby is not just a likely result. It is certainly the most probable result. It is therefore murder.

[44] The facts of the case and the roles played by the accused have found substantially similar situations in *State of Assam v. Muhim Berkataki and Anor* AIR [1987] SC 98; and *Hyam v. Director of Prosecutions* [1975] AC 55 HL, respectively.

[45] In *Muhim Berkataki and Anor, supra*, the accused sprinkled and poured kerosene oil in the deceased's shop as well as on the deceased's person. The deceased's dying declaration implicated the two accused persons as his assailants. There was also reliable evidence of eye-witness. The Supreme Court of India held that the prosecution had proved the charges under s. 302 read with s. 34 beyond reasonable doubt against both the accused.

[46] In *Hyam, supra*, the female appellant had a relationship with a man who became engaged to be married to B. In the early hours of 15 July 1972, the appellant went to B's house and poured petrol through the letter box, stuffed newspaper through and lit it. She gave B no warning but went home leaving the house burning. B escaped from the house but her two daughters were suffocated by the fumes of the fire. The appellant was charged with their murder. Her defence was that she had set fire to the house only in order to frighten B so that she would leave the neighbourhood. The appellant was convicted of murder and her appeal against conviction was dismissed by the Court of Appeal. The appellant's further appeal to the House of Lords was also dismissed. The majority (3-2) held that a person who, without intending to endanger life, did an act knowing that it was probable that grievous, in the sense of serious, bodily harm would result was guilty of murder if death resulted.

[47] In the circumstances, we answer the above question in the affirmative.

Conclusion

[48] On the foregoing grounds, the accused's appeal, being without merits, was dismissed. We affirmed the whole of the decision of the High Court.